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NO. 209

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Supreme Court of the United States

OCTOBER TERM, 1949.

BURMAN PROPERTIES, INC., ET AL., *Petitioners,*

v.

ROSCOE L. MCKINNEY, ET AL., *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Supreme Court of the United States

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No. 209.

BURMAN PROPERTIES, INC., a Corporation and LOUIS BURMAN, *Petitioners,*

v.

ROSCOE L. MCKINNEY, BERTIE D. BARNETT, CLOTILDA A. BARNETT, WALTER G. DANIEL, THEODORA W. DANIEL, THOMAS H. BRYANT, LILLIAN I. BRYANT, KERMIT ALBERT BANKS, EDNA MAE ROBINSON, PERCY A. FITZGERALD, ARTIE B. FITZGERALD, SARAH COATES, BERTHA C. ANDERSON, ELPHONZO W. FREEMAN, DOROTHY G. BALLARD, LYDIA M. HILLMAN, AMBROSE CALIVER and ROSALIE CALIVER, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENTS IN OPPOSITION.

To the Honorable, the Judges of the Supreme Court of the United States:

This case involved enforcement of a building restriction line covenant applicable only to a small area within the District of Columbia. At no time in any stage of the proceedings prior to filing of the Petition for a Writ of Certiorari in this cause has a constitutional issue ever been presented. Petitioners now seek to assert that they have

been denied a fair trial under the due process clause of the Constitution.

A review of the record will disclose that petitioners were allowed a full hearing on the preliminary injunction and were allowed to develop issues beyond the scope of their pleadings on the permanent injunction. At the conclusion of these trials, the trial court found for the respondents in an opinion which was adopted by the Court of Appeals. (R. 10-18 inc., R. 22, and R. 100).

The facts in this case are not those alleged by the petitioners but instead are those found by the lower courts as contained in the memorandum opinion. (R. 10-13 inc.) Petitioners' statement of the case in their Petition for Writ of Certiorari presents excerpts of testimony as the facts of the case. These excerpts were presented to the trial court as the Findings of Facts and Conclusions of Law and were refused. (R. 18-21 inc.) They were likewise presented and argued fully in the Court of Appeals and denied by that Court. They should be denied by this Court.

Respondents respectfully submit that the findings of fact approved and adopted by each of the lower courts are amply supported by the entire evidence. In *Chicago Junction Railway Co.* v. *King*, 222 U. S. 222, 224 this court has said, ". . . we do not think we are called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible by a minute analysis of the evidence, to draw therefrom inferences which may possibly conflict with the conclusions of the courts below as to the tendencies of the proof . . . We think our entire duty will be performed by giving to the record such examination and consideration as may be necessary to enable us to determine whether plain error was committed by the Court below in any of the particulars complained of." Respondents assert that there have been no errors committed by the courts below and for this reason and for those reasons contained in the arguments below, the Petition for Writ of Certiorari should be denied.

REPLY TO PETITIONERS' CONTENTIONS.

Petitioners' contentions 1 to 4 inclusive are basically questions of fact which have been argued in each of the courts below and have been rejected in each of those courts after full argument and full consideration. The petitioner's contention numbered 5 alleging a violation of the "due process" clause of the Fifth Amendment is raised for the first time in this court. This contention is obviously so unsubstantial as to be without color or merit and therefore the petition should be denied.

SUMMARY OF ARGUMENT.

The petitioners have been heard fully in each of the courts below and cannot conscientiously claim that they have been denied "due process" merely because the lower courts have ruled against them. The Court of Appeals has properly applied the law applicable to the issues of this case which merely concerns the enforcement of a personal covenant pertaining to a building restriction line applicable to a small section within the District of Columbia and as such does not constitute a violation of the due process clause of the Fifth Amendment.

The courts below were correct in ruling that the violations alleged of the respondents, namely open porches, bay windows, and steps which invade the restricted area in a uniform manner, were not in fact violations but were instead built in accordance with a reasonable and popular interpretation of the covenant acquiesced in for many years by all concerned. Under this proper ruling of the lower courts, porches, bays and steps are not violations of the covenant and do not constitute a waiver of the covenant.

Considering for the moment that the respondents had violated the covenant, the courts were also correct in ruling that the doctrine of "pro tanto" does not apply and that petitioners should be estopped from erecting a commercial structure covering the entire restricted area since they

thereby attempt to violate the covenant in a manner entirely dissimilar to that alleged of the respondents.

Finally, since the purpose of the covenant was to make the area more desirable for residential uses, which purpose still exists, the covenant should be enforced for the benefit of the majority of the property owners and residents protected thereby.

ARGUMENT.

A. As to Jurisdiction.

I. This Court should deny jurisdiction since "due process" has been accorded petitioners who have been heard fully in both courts below.

Petitioners seek a Writ of Certiorari on the grounds that they were denied "due process" under the Fifth Amendment in the courts below. This contention is now raised for the first time in their petition to this Court and is interposed in an attempt to secure a review by this Court of a case purely local in nature which petitioners have lost after numerous full hearings had in the lower courts. Any claim by petitioners that they have been denied "due process" in the trial in this cause should have been raised in the appellate court.

In *Corrigan* v. *Buckley*, 271 U. S. 323, at page 330, this court states: "The Fifth Amendment 'is a limitation only upon the powers of the General Government.' Talton v. Mayes, 163 U. S. 376, 382, 16 S. Ct. 986, 988 (41 L. Ed. 196), and is not directed against the action of individuals." Thus the action of the respondents in seeking to enforce a purely local, private building line covenant does not violate the due process clause of the Constitution as alleged by the petitioners merely because the enforcement of the covenant imposes a different burden upon residential and commercial properties. Emergency rent laws passed during both World Wars I and II have imposed burdens on residential property which burdens were not imposed upon commercial property. These laws have been upheld by courts and

have been declared constitutional. Therefore, the fact that a different burden is imposed upon the two classes of property does not in any way constitute a denial of "due process".

In *Corrigan* v. *Buckley, supra,* involving property within the District of Columbia at page 331, 332 this court states:

> "And while it was further urged in this Court that the decrees of the courts below in themselves deprived the defendants of their liberty and property without due process of law, in violation of the Fifth and Fourteenth Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the Code provision, it was not raised by the petition for the appeal or by any assignment of error, either in the Court of Appeals or in this Court; and it likewise is lacking in substance. *The defendants were given a full hearing in both courts; they were not denied any constitutional or statutory right; and there is no semblance of ground for any contention that the decrees were so plainly arbitrary and contrary to law as to be acts of mere spoliation.* See Delmar Jockey Club v. Missouri, supra, 335 (28 S. Ct. 732). *Mere error of a court, if any there be, in a judgment entered after a full hearing, does not constitute a denial of due process of law.* Central Land Co. v. Laidley, 159 U. S. 103, 112, 16 S. Ct. 80, 40 L. Ed. 91; Jones v. Buffalo Creek Coal Co., 245 U. S. 328, 329, 38 S. Ct. 121, 62 L. Ed. 325.
>
> "It results that, in the absence of any substantial constitutional or statutory question giving us jurisdiction of this appeal under the provisions of section 250 of the Judicial Code, we cannot determine upon the merits the contentions earnestly pressed by the defendants in this court that the indenture is not only void because contrary to public policy, but is also of such a discriminatory character that a court of equity will not lend its aid by enforcing the specific performance of the covenant. *These are questions involving a consideration of rules not expressed in any constitutional or statutory provision, but claimed to be a part of the*

common or general law in force in the District of Columbia; and, plainly, they may not be reviewed under this appeal unless jurisdiction of the case is otherwise acquired.

"Hence, without a consideration of these questions, the appeal must be, and is dismissed for want of jurisdiction." (Emphasis supplied)

The mere fact that petitioners have been unsuccessful in having their contentions prevail does not constitute lack of due process nor should it be considered as basis for this court to assume jurisdiction. The petition should therefore be denied.

II. Jurisdiction should be denied for failure of petitioners to comply with the rules of this Court.

Petitioners in every instance fail to comply with the provisions contained in rule 27 subsection 3 of this Court with reference to citing exhibits. Therefore, respondents aver that these exhibits are not properly before this Court and that the petition should not be considered since it is based primarily upon exhibits which are not presented in compliance with the rules of this Court. Nevertheless, respondents reply seriatim to each of petitioners' arguments to show their basic lack of merit.

B. In Answer to Petitioners' Arguments.

I. Covenant is not waived and is enforceable.

The covenant in this case covers an area of many city blocks and is much too large an area to be treated as one neighborhood.

In *Schadt* v. *Brill*, 139 N. W. 878, 173 Mich. 647, at page 652, the court states:

"We find that law well settled to the effect that a person owning property in restricted territory does not waive or lose his right to enforce the restrictions where their violation becomes especially and personally offensive and injurious to him and his property, by reason of his previous omission to take notice of viola-

tions, and insist on observance of the covenants, *in cases not affecting him or his interests, or the locality in which his property is situated.* Brigham v. H. G. Mulock Co., 74 N. J. Eq. 287, (70 Atl. 185); McGuire v. Caskey, 62 Ohio St. 419 (57 N. E. 53); Stewart v. Finklestone, 201 Mass. 28 (92 N. E. 37) . . ." (Emphasis supplied)

Violations of the covenant, other than those alleged of the respondents, referred to by the petitioners (see Petition page 4, paragraph 2) are of a questionable nature in that they consist of specific properties which are on the boundary line and are part in and part out of the restricted area or else are so distant from the respondents' property that they in now way affect the respondents' right to light and air as reserved to them under the covenant.

The respondents deny that they or their predecessors in title have in any way, by action or omission, waived the covenant. On the contrary, the respondents aver that the law and facts set forth above and as set forth in the opinions of the lower courts sustain the respondents' position (R. 15, lines 16-23 inc.). Petitioners' contention in Argument I is wholly unsupported by the facts of this case.

II. The court was correct in holding that the respondents whose porches, bay windows, and steps project into the restricted area may enforce the building line covenant against petitioners who seek to build a store on the restricted area.

None of the District of Columbia cases on covenants are directly controlling on the issues of this case. Petitioners cite *Curtis* v. *Rubin*, 244 Ill. 88, 91 N. E. 84; *McGovern* v. *Brown*, 317 Ill. 73, 147 N. E. 664; *Ewertsen* v. *Gerstenberg*, 186 Ill. 344, 57 N. E. 1031; and *Kneip* v. *Schroeder*, 255 Ill. 621, 99 N. E. 617, as controlling. Respondents state that the law in these cases is good but does not apply to the facts in this case. The leading and controlling case which fits the facts in the instant case is *O'Neill* v. *Wolfe*, 338 Ill. 508, 170 N. E. 669 which distinguishes the cases cited by

the respondents as disclosed in the language taken from *Burke* v. *Kleiman*, 277 Ill. App. 519, at page 531:

> "Appellants contend that 'since the execution by the various parties thereto of the restrictive agreement hereinbefore referred to, the agreed statement of facts shows that the conditions of the restricted area had so changed since said agreement was executed, as herein set forth, that said restrictive agreement is no longer operative,' and the injunction should be denied. Appellants rely upon such cases as Ewertsen v. Gerstenberg, 186 Ill. 344; and Kneip v. Schroeder, 255 Ill. 621, which follow the general rule that where the property involved has so changed in character and environment and in the uses to which it may be put as to make it unfit or unprofitable for use if the restriction be enforced, or where to grant the relief asked would be a great hardship on the owner and of no benefit to complainant, equity will refuse to intervene in complainant's behalf. *In O'Neill* v. *Wolfe, 338 Ill. 508, 526, the court stated that there could be no question as to the soundness of the rule followed in the Ewertsen and Kneip cases 'wherever the circumstances of a case are such as to make it applicable.'* In the O'Neill case the court quotes with approval from Morrow v. Hasselman, 69 N. J. Eq. 612 (p. 524):
>
> "'. . . *The materiality of the violation is to be determined by the circumstances of each case, and the question seems to be whether they are such as to indicate an abandonment of the original general plan and make its enforcement inequitable because of the changed condition of the property under restriction . . .*'
>
> *The O'Neill case also holds that the materiality of the violation is to be determined by the circumstances of each case, and the question is whether the violations are such as to indicate an abandonment of the original general plan and to make its enforcement inequitable because of the changed condition of the property under restriction.*" (Emphasis supplied)

In the case of *Brigham* v. *Mulock Co.*, 70 At. 185, 74 N. J. Eq. 287, at page 290 thereof the court states:

> "The fact that so many buildings have been erected with the main body of the buildings located with ref-

erence to the building line and with open porches and bay windows extending over the line measurably indicates a popular interpretation of the restriction to that effect."

In *Dalstan* v. *Circle Amusement Co.*, 130 N. J. Eq. 354, 22 At. (2d) 245 the plaintiffs had eighteen years ago built sun porches in violation of the covenant. Nevertheless defendant who contemplated a different type violation was enjoined. See also *Winslow* v. *Newcomb*, 100 Atl. 613, 87 N. J. Eq. 480.

In accordance with the principles of law quoted above the lower courts have made findings of fact in this case as set forth in the Memo Opinion (R. 10-18 inc.), and the petitioners have failed to show any valid reason why this Court should set aside those opinions. The petition should be dismissed.

III. The objects of the covenant still exist and should be enforced.

Inasmuch as the covenanted area is much too large to be treated as one neighborhood, the issue is whether or not the immediate neighborhood has so changed as to make its objects unobtainable and therefore unenforceable. Respondents contend and it is so found in the Court's opinion, that the area involved, particularly Lamont Street between 13th and 11th Streets, is an attractive residential neighborhood for persons of moderate means (R. 12, line 21). The covenant therefore should be enforced.

The case of *Hundley* v. *Gorewitz*, 77 App. D. C. 48, 132 F. (2d) 23, involving the same covenanted area will show that the covenant involved therein was a covenant against ownership or occupancy by negroes and that the only change in the covenanted area was a change from caucasian to negro ownership and occupancy and was not a change from residential usage to commercial. Therefore, a thirty-foot building restriction line which is obviously imposed to make a neighborhood desirable for residential usage should be enforced to protect the residents.

The case of *Jameson* v. *Brown*, 109 F (2d) 830, 71 App. D. C. 254, also involving the same covenanted area, held that most, if not all, of the tract was clearly fit and profitable for residence use and that the covenant against the sale of spirituous liquors should be and was upheld, even though liquor was sold just across the boundary line. The covenant with respect to a building restriction line enhances the neighborhood for use as residential property and should therefore be enforced.

To like effect see *Kennally* v. *Chevy Chase Land Co. of Montgomery County*, 63 App. D. C. 327, 72 F (2d) 378.

IV. Pro tanto doctrine.

In *Bacon* v. *Sandberg*, 179 Mass. 396, 60 N. E. 936, Justice Holmes held that where complainants had violated a building restriction line with bay windows, porches and steps, that nonetheless, the line would be enforced at their request against the defendant who sought to invade the line by erecting a separate building into the restricted area. Defendant's attempted violation was enjoined as the separate building he sought to erect was a violation entirely different from that of the complainants.

The "pro tanto" doctrine means that defendant will be allowed to violate a covenant to the same extent as complainant *provided the violation is of the same type and nature*. *Burns* v. *Terzian*, 233 Mich. 627, 207 N. W. 913.

To like effect see *Dalstan* v. *Circle Amusement Co.*, 130 N. J. Eq. 354, 22 Atl. (2d) 245, *supra*, and *O'Neill* v. *Wolfe*, 338 Ill. 508, 170 N. E. 669, *supra*.

Pro tanto applies where a building line has been violated in part. Under this doctrine the courts will allow others to invade the restricted area to the same extent and in effect they establish a new line and create an exception to the original covenant, preserving the balance of the covenant, provided there is something of value remaining of the covenant to save. However, in this case, the courts below have held that the respondents' porches, bay windows, and steps are not violations but reflect a popular and almost

universal interpretation of the covenant which has existed for many years. (See *Brigham* v. *Mulock Co., supra*). In any event, the pro tanto doctrine does not apply in the instant case since petitioners seek to violate the covenant in an entirely dissimilar manner from that alleged of respondents.

V. To enjoin owners of commercial property from violating a building restriction line in a manner dissimilar from that alleged of respondents, is not a violation of due process.

The fact that so many houses have been erected in this subdivision with the main body of the buildings located with reference to the building line and with open porches, bay windows and steps extending over the line indicates a popular interpretation of the restriction to that effect. *Brigham* v. *Mulock*, 74 N. J. Eq. 287, 290, *supra; Morrow* v. *Hasselman*, 69 N. J. Eq. 612, 617; *McGuire* v. *Caskey*, 62 Ohio 419, 57 N. E. 53. The covenant should therefore be enforced.

However, even if it should be held that the respondents have violated the covenant, as petitioners allege, the petitioners cannot complain that they have been denied "due process" when the courts, at the complaint of the respondents, enjoin the petitioners from violating the covenant in a manner completely dissimilar from the violations alleged of the respondents. *O'Neill* v. *Wolfe, supra; Bacon* v. *Sandberg, supra; Dalstan* v. *Circle Amusement Co., supra.*

Lastly, the Fifth Amendment applies only as limitation of general governmental powers and cannot be invoked to preclude the enforcement of a private covenant.

VI. Enforcement of the covenant will benefit the entire neighborhood.

This point was not asserted in the petition as grounds for its allowance but is presented by way of argument in the petitioners' brief. It is questionable, therefore, as to

whether, under Rule 38, subsection 2, this Court should consider the point. However, it may be pointed out that the covenant was adopted to foster a more desirable residential neighborhood. The neighborhood is still residential (*Hundley* v. *Gorewitz, supra; Jameson* v. *Brown, supra*) and even though 11th Street was "cut through" after imposition of the covenant and parts thereof zoned as commercial property, these acts do not authorize petitioners to violate the pre-existing building restriction line imposed on properties facing on Lamont Street, including that of the petitioners. To allow petitioners to violate the building restriction line covenant would nullify and void the covenant and work inestimable damage to respondents and others likewise situated.

CONCLUSION.

This case is one purely local in nature, one in which petitioners have been accorded full hearings in the courts below, and one which has been decided in accordance with the leading cases in many jurisdictions. Accordingly, it is respectfully submitted that the petition for certiorari in this case be denied.

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